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The Death of the Supreme Court's Certified Question Jurisdiction

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ESSAY

THE DEATH OF THE SUPREME COURT'S CERTIFIED QUESTION JURISDICTION

Aaron Nielson⁺

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In my experience, there is a difference between how law is taught in England and in the United States. In England, professors lecture—without interruption. Not so in the United States, where students can and do ask questions. There are advantages to both approaches, but neither is perfect. A point in favor of the English model is that the professor is more knowledgeable than the student, so she can better identify what is most important and interesting. In the United States, the worst courses are those where asking and answering tangential or obvious questions wastes too much class time.¹ Still, if done well, there is much to commend in the American practice of encouraging questions. Because the professor does not know what the students do not understand, an insightful inquiry can salvage a class. Students thus should feel comfortable asking questions, but not *too* comfortable.

What is true in the classroom can be true in the federal judiciary. The United States Supreme Court, though not necessarily wiser than the courts of appeals, has a distinct advantage: from the perspective of the intermediate courts, the Court can do no wrong—“[w]e are not final because we are infallible, but we are infallible only because we are final,” and all of that.² Put another way, the courts of appeals, on occasion, may be in a position not that dissimilar to a student listening to a confusing professor. Sometimes the appellate courts can divine the Supreme Court’s principle, but sometimes they

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1. Cf. Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 638 (1973) (observing that approximately one-third of surveyed law students criticized the Socratic method, finding it demeaning, confusing, neglecting substance, and encouraging irrelevant discussion and “game-playing”).

2. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

cannot. When doctrine is cloudy, wouldn't it be great if the lower courts could just ask the Supreme Court for the correct statement of the principle? You know, there really ought to be a law

But there already is a law that allows federal appellate courts to ask the Supreme Court questions,³ and there has been such a law in some form for over 200 years!⁴ Unfortunately, despite its potential utility—especially in those cases where it is the Court's own precedent that has caused the confusion, such as those involving tough sentencing issues,⁵ the proper application of habeas corpus,⁶ the First Amendment,⁷ or the separation of powers⁸—and despite its history that includes both lofty and loathsome cases like *Ex parte Milligan*⁹ and *Korematsu v. United States*,¹⁰ today “there are few lawyers (and perhaps few circuit judges) who even know” that this statutory “option” exists.¹¹ There is a reason for this ignorance: since 1946, the Court

3. See 28 U.S.C. § 1254(2) (2006) (empowering courts of appeals to certify questions of law to the United States Supreme Court at any time that “instructions are desired”).

4. See Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159–61 (permitting circuit courts to certify questions to the Supreme Court); see also *infra* notes 19–25 and accompanying text.

5. See, e.g., *United States v. White*, 551 F.3d 381, 384–86 (6th Cir. 2008) (en banc) (citing *United States v. Booker*, 543 U.S. 220, 229 n.1, 244 (2005)) (deciding whether, in light of the substantive and remedial holdings of *United States v. Booker*, a sentence enhancement can be based on acquitted conduct), *cert. denied*, 129 S. Ct. 2071 (2009). In *Booker*, the Supreme Court held that a judge relying on a fact not found by a jury to enhance a mandatory sentence under the Federal Sentencing Guidelines violated the Sixth Amendment right to a jury trial. *Booker*, 543 U.S. at 229 n.1, 244.

6. See, e.g., *Bismullah v. Gates*, 551 F.3d 1068, 1070 (D.C. Cir. 2009) (citing *Boumediene v. Bush*, 128 S. Ct. 2229 (2008)) (deciding whether, in light of *Boumediene v. Bush*, the court had jurisdiction under the Detainee Treatment Act). In *Boumediene*, the Supreme Court held that the Suspension Clause of the Constitution applied in Guantanamo Bay and that the Military Commissions Act did not meet constitutional requirements for lawful suspension of habeas corpus. *Boumediene*, 128 S. Ct. at 2262.

7. See, e.g., *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 285–86 (4th Cir. 2008) (citing *McConnell v. FEC*, 540 U.S. 93 (2003)) (deciding whether campaign laws are facially valid after *McConnell v. FEC*). In *McConnell*, the Supreme Court rejected a facial First Amendment challenge to a campaign finance statute. *McConnell*, 540 U.S. at 207.

8. See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 559 F.3d 578 (D.C. Cir. 2009), *vacated*, 330 F. App'x 200 (D.C. Cir. 2009) (deciding the scope of the political question doctrine under cases such as *Baker v. Carr*, 369 U.S. 186 (1962)).

9. 71 U.S. (4 Wall.) 2, 127 (1866) (holding unconstitutional the use of military tribunals when civilian courts are still available).

10. 319 U.S. 432, 433, 436 (1943) (ruling in response to a certified question that the federal appellate court had jurisdiction to review a district court decision). On remand, the circuit court entered its judgment, and the Supreme Court, on a writ of certiorari, upheld the shameful treatment of a group of American citizens. See *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding the constitutionality of an order that called for segregating Japanese Americans during World War II).

11. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1712 (2000).

has only answered four certified questions,¹² making certification jurisdiction nothing more than a “dead letter.”¹³

The definitive article on the subject of certified questions, Professors Moore and Vestal's *Present and Potential Role of Certification in Federal Appellate Procedure*, has recently turned sixty years old.¹⁴ Like this Essay, Moore and Vestal argued that it is sometimes appropriate for an appellate court to ask a question of the Supreme Court, and in their article Moore and Vestal expected the practice of certifying questions to continue into the future.¹⁵ Sadly, however, their prognostication has proven dead wrong—a regrettable fact confirmed by the Supreme Court's decision this very term to dismiss a question certified to it by the en banc Fifth Circuit.¹⁶ In light of the Supreme Court's diminished certiorari docket and the increased calls for institutional reform of how the Court chooses which cases it will decide, now seems a particularly fitting time to ponder the death of certified question jurisdiction.

I. THE LIFE OF CERTIFICATION

There are a number of statutory ways a question can come before the Supreme Court. Although a few provisions provide for direct appeal,¹⁷ the far-and-away most common route is by writ of certiorari, provided for in 28 U.S.C. § 1254(1).¹⁸ What has been forgotten, however, is that § 1254 has two parts. Section 1254(2) expressly provides:

Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.¹⁹

Though § 1254(2) was renumbered in 1988 when Congress eliminated a provision allowing for more direct appeals to the Supreme Court²⁰ (note, Congress did not eliminate certification jurisdiction, even though some

12. *See id.* at 1712 & n.404.

13. *See id.* at 1712.

14. James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1 (1949).

15. *Id.* at 24–25.

16. *United States v. Seale*, 130 S. Ct. 12 (2009) (statement of Stevens, J.).

17. *See, e.g.*, 42 U.S.C. § 1973b(a)(5) (2006) (providing a right of direct appeal to the Supreme Court in certain cases relating to voting rights); *see also* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

18. *See* 28 U.S.C. § 1254(1) (articulating the certiorari process for courts of appeals).

19. 28 U.S.C. § 1254(2); *see also* SUP. CT. R. 19 (outlining the “[p]rocedure on a [c]ertified [q]uestion”).

20. Act of June 27, 1988, Pub. L. No. 100-352, § 2, 102 Stat. 662, 662 (1988) (codified as amended at 28 U.S.C. § 1254 (2006)).

recommended doing so²¹), this version of the statute has been part of the United States Code since 1948,²² and a “substantially” identical version has existed since 1925.²³ The principle that lower courts can certify questions to the Supreme Court, however, is much older than that. Indeed, certification jurisdiction dates all the way back to 1802 when Congress instructed the Supreme Court, upon certification, to “finally decide[]” “any question . . . before a circuit court, upon which the opinions of the judges shall be opposed.”²⁴ As Chief Justice John Marshall explained, without this avenue, a “division of opinion” might “remain, and the question would continue unsettled.”²⁵

For a long time, certification was the exclusive statutory method by which many cases could reach the Supreme Court. Until 1889, the Court could only review errors in criminal cases “upon a certificate of division of opinion,” and even then only capital cases could be brought by writ of error.²⁶ Likewise, for civil cases, the Court’s “appellate jurisdiction was limited by the sum or value of the matter in dispute; but the jurisdiction on certificate was not dependent thereon”²⁷

Even after the modern courts of appeals were created by the Judiciary Act of 1891,²⁸ certification was still a meaningful route to High Court review. For example, “[i]n the decade from 1927 to 1936, courts of appeals issued seventy-two certificates”²⁹ Since 1930, however, when sixteen cases arrived via certification,³⁰ the number of certified cases has fallen, until now they are nearly unheard of. Between 1937 and 1946, there was a total of twenty

21. See *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 603 (1972) (“We also recommend repeal of the authorization for certification of questions from a court of appeals to the Supreme Court.”).

22. Act of June 25, 1948, Pub. L. No. 80-773, § 1254(3), 62 Stat. 869, 928 (codified as amended at 28 U.S.C. § 1254(2) (2006)).

23. See Act of Feb. 13, 1925, ch. 229, sec. 239, 43 Stat. 936, 938; see also 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, *FEDERAL PRACTICE AND PROCEDURE* § 4038 (3d ed. 2007) [hereinafter WRIGHT & MILLER] (explaining the history of certification jurisdiction).

24. Act of Apr. 29, 1802, ch. 31, sec. 6, 2 Stat. 156, 159.

25. *United States v. Daniel*, 19 U.S. (6 Wheat.) 542, 548 (1821).

26. *United States v. Rider*, 163 U.S. 132, 138 (1896) (“[A]s to criminal cases a certificate of division was the only mode in which alleged errors could be reviewed.”).

27. *Id.* at 137.

28. Act of Mar. 3, 1891, ch. 517, sec. 2, 26 Stat. 826, 826–27, 830 (1891); see also Evan A. Evans, *Fifty Years of the United States Circuit Court of Appeals*, 9 MO. L. REV. 189, 201 (1944) (describing the history of the Judiciary Act, primarily sponsored by William M. Evarts).

29. Hartnett, *supra* note 11, at 1710 (observing that “[i]n the decade from 1927 to 1936, courts of appeals issued seventy-two certificates”); see also Moore & Vestal, *supra* note 14, at 25–26 n.99 (presenting a chart comparing the number of cases certified by courts from 1927–36 and 1937–46).

30. Moore & Vestal, *supra* note 14, app. I, at 46.

successfully certified cases,³¹ and since 1946, “the Court [has] accepted only four certificates.”³² The last time the Court even mentioned § 1254(2) in an opinion from an argued case was more than twelve years ago when Justice David Souter’s concurrence in *Felker v. Turpin* noted its existence in passing.³³ At this time, it is fair to say that “outright repeal . . . would be little more than an official obituary,” because this statute is already dead.³⁴

There is little hope of resurrection, at least not any time soon. Last year, in *United States v. Seale*, the United States Court of Appeals for the Fifth Circuit, sitting en banc, certified a question to the Supreme Court—itsself “a newsworthy event”³⁵—thereby giving the Supreme Court a chance to revive certification.³⁶ The Court summarily declined the invitation. To appreciate why this is so disappointing, consider the factually chilling and legally consequential question offered by the Fifth Circuit. In 2007, James Ford Seale, an alleged member of the Ku Klux Klan, was indicted for a kidnapping that occurred in 1964.³⁷ The victims never made it home alive.³⁸

In 2007, a Mississippi jury convicted Seale, sentencing him to life in prison.³⁹ On appeal, however, a Fifth Circuit panel ordered a judgment of acquittal.⁴⁰ When the crime was committed, kidnapping was considered a capital crime that had no statute of limitations,⁴¹ but in 1972, a five-year limitations period was imposed after two Supreme Court cases questioned the constitutionality of the death penalty statute.⁴² Relying on that five-year period, the Fifth Circuit panel held that the statute of limitations had run for Seale.⁴³

The case was heard en banc, and the full court split nine to nine on whether the panel’s ruling was correct.⁴⁴ Because of the tie vote, there is no circuit

31. *Id.* at 25–26 n.99.

32. Hartnett, *supra* note 11, at 1712.

33. *Felker v. Turpin*, 518 U.S. 651, 667 (Souter, J., concurring).

34. WRIGHT & MILLER, *supra* note 23, at § 4038.

35. *United States v. Seale*, 130 S. Ct. 12 (2009) (statement of Stevens, J.).

36. *United States v. Seale*, 577 F.3d 566, 571 (5th Cir. 2009) (per curiam).

37. *See United States v. Seale*, 542 F.3d 1033, 1034 (5th Cir. 2008), *rev'd on reh'g*, 577 F.3d 566 (5th Cir. 2009); *Moore v. Franklin County, Miss.*, 638 F. Supp. 2d 703, 705 (S.D. Miss. 2009).

38. *Moore*, 638 F. Supp. 2d at 705.

39. *Seale*, 542 F.3d at 1034.

40. *Id.* at 1045.

41. *Id.*

42. *See Seale*, 577 F.3d at 568 (citing *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) and *United States v. Jackson*, 390 U.S. 570, 581–82 (1968)).

43. *Seale*, 542 F.3d at 1038 (“[C]hanges to criminal statutes of limitations presumptively apply retroactively to pre-amendment offenses, absent *Ex Post Facto* concerns . . .”).

44. *Seale*, 577 F.3d at 570.

decision, and the district court's ruling stands.⁴⁵ Over the concerns of a group of dissenting judges who thought that "[t]he likelihood of the Court's accepting certification, based on past usage, [wa]s virtually nil,"⁴⁶ the circuit certified the statute of limitations issue to the Supreme Court, noting it involved a pure question of criminal law, different federal courts resolved the question differently, a life sentence depended on the answer, and the government was investigating other "cold" civil rights cases within the circuit's geographic boundaries.⁴⁷

The Fifth Circuit's attempt in *Seale* to breathe new life into certification jurisdiction should have been welcomed by the Court as an opportunity to set things right with § 1254(2). Yet over the objection of only Justices John Paul Stevens and Antonin Scalia, the Court, with nary a word of explanation, declined to answer the question posed to it. If the issue in *Seale*—a difficult and important one that has equally divided an entire federal circuit—cannot successfully be certified, then we might as well delete § 1254(2) from the United States Code, because it is difficult to imagine a case in which certification would be more appropriate.

II. THE DEATH OF CERTIFICATION

The question, then, is not *whether* certification is dead, but *why* it is dead. Or, rather, who killed it? The Supreme Court did, although not without its accomplice, the courts of appeals. Certification's premise, allowing, as it does, an appellate court in *its* discretion to ask the Court to answer a question,⁴⁸ is inconsistent with the Court's conception of itself. As Professors Frankfurter and Landis noted many years ago, "the Supreme Court [is] hostil[e] to a procedure by which the Court may be called upon to make rulings without the benefit of a decision below."⁴⁹ Similarly, Moore and Vestal explained that the Court questioned certification due to its "fear that an extensive use of certification would unduly enlarge its obligatory jurisdiction," thereby "frustrat[ing] the Court's proper functioning as a policy-determining body"⁵⁰

45. *Id.* (noting that the divided vote by the en banc court rendered the per curiam order devoid of precedential value).

46. *Id.* at 572 (Jones, J., dissenting) (arguing that certification "is not worth this busy court's time or that of the also-busy Supreme Court"). The dissent also noted that the panel "might ultimately" find another way to reverse the conviction, so it was "imprudent" to certify the question at that time. *Id.*

47. *Id.* at 570–71.

48. WRIGHT & MILLER, *supra* note 23, at § 4038 ("In form and history, this certified question jurisdiction is mandatory.").

49. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 36 (1931) (discussing the procedure of certification).

50. Moore & Vestal, *supra* note 14, at 23, 42. The Court was also wary of "*pro forma* certification" (that is, circuit courts shirking their duties) and answering questions "without a clear indication that the facts of the case require such a declaration." *Id.* at 23. As Moore and

The murder weapon has been passive aggression. As Moore and Vestal observed, although “the Court supposedly has no discretion in certifications, which invoke its obligatory jurisdiction, pragmatically it is able to control the employment of the procedure.”⁵¹ In particular, by means of “[c]urt *per curiam* dismissals,” the Court successfully discouraged certification.⁵² “[w]henever the Supreme Court . . . dismissed a certificate from a lower court, that court . . . usually refrained from certifying for a number of years.”⁵³ Indeed, in *Wisniewski v. United States* in 1957, the Court—contrary to the statutory text⁵⁴—went so far as to dismiss with a one-page *per curiam* a certified question on the grounds that the Court’s jurisdiction is too “exceptional” to merit resolving a mere intra-circuit split.⁵⁵ The Court decreed that

[i]t is . . . the task of a Court of Appeals to decide all properly presented cases coming before it, except in the rare instances, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business.⁵⁶

The judges of the courts of appeal got the message. As one appellate judge succinctly put it: “[t]he attitude of the Supreme Court has not encouraged the use of this technique”⁵⁷

The courts of appeals, however, have been complicit. Perhaps driven by the Court’s hostility to the certification procedure, appellate courts have almost completely stopped certifying questions,⁵⁸ and some have even embraced the

Vestal ultimately observed, however, none of these concerns were serious problems. *Id.* at 23–24.

51. *Id.* at 22.

52. *Id.* at 22–23 n.87.

53. *Id.* at 22 n.86.

54. See, e.g., EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 596 (9th ed. 2007).

55. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*).

56. *Id.*; see also Comment, *Certified Question on a Division of Opinion Between Two Panels of a Court of Appeals Dismissed*, 43 IOWA L. REV. 432, 436 (1958) (discussing *Wisniewski* as “another step in the process of severely limiting the effectiveness of a very useful procedural tool”). In its zeal to eradicate this procedural device, the Court has even limited the category of cases it expressly reserved in *Wisniewski*. In *United States v. Fafowora*, the Court—in a one-sentence order—dismissed a question from the D.C. Circuit that was premised on two cases in which certiorari had been granted but had not yet been decided. 489 U.S. 1002, 1002–03 (1989).

57. Evans, *supra* note 28, at 202 n.72 (explaining the attitude of the Supreme Court toward the certification of questions from circuit courts of appeals).

58. Moore & Vestal, *supra* note 14, at 21–22. In 2004, the Second Circuit, sitting en banc, certified three questions, which the Supreme Court “summarily dismissed,” instead granting certiorari on two separate cases raising the same issue. GRESSMAN, *supra* note 54, at 597 (citing *United States v. Penaranda*, 543 U.S. 1117, 1117 (2005)). In 1992, a panel of the Fifth Circuit certified a question, which the Court summarily dismissed citing its ruling in *Wisniewski*. See *In re Slagle*, 504 U.S. 952, 952–53 (1992) (finding that jurisdiction over the disputed issue “rests in the first instance in the Court of Appeals”).

Court's point of view.⁵⁹ For example, in a *per curiam* joined by no less than Chief Judge Learned Hand, the Second Circuit explained that it would only certify a question if "no petition for certiorari is available to the aggrieved party."⁶⁰ Laying history and congressional will aside, the panel explained: "we can see no reason for imposing an appeal upon the Supreme Court, which it does not choose to take of its own motion," because "[i]t is not for us to decide what matters are of enough importance to require decision by that court; the control of its docket should rest exclusively in its own hands."⁶¹ The Supreme Court's animosity, mingled with this attitude of some appellate courts, has slowed the use of certified questions to the point where it is unclear how many judges today even know this option exists—which, given *Seale*, is probably just as well.

III. MOURNING CERTIFICATION'S UNTIMELY DEMISE

Moore and Vestal wrote their article while certified jurisdiction was "only mostly dead," so still "slightly alive."⁶² Appellate courts asked the Supreme Court questions, just not too many. Moore and Vestal, moreover, expressed confidence that if "modestly used," the Court would be amenable to certification, and so they expected the practice to continue, particularly because certified questions comprised such a small portion of the Court's docket.⁶³ This has not proven true, as the last sixty years emphatically demonstrate.⁶⁴

Regrettably, there is little likelihood that the Supreme Court will reverse course any time soon. The Court's failure in *Seale* to summon certification from the tomb should be mourned for three reasons, one philosophical and two pragmatic. First, philosophically, it is discouraging that the Court treated the Fifth Circuit's question so lightly, certification boasting as it does both a hefty historical pedigree and the imprimatur of the political branches. Although the Court surely prefers to have complete control over its docket (and who wouldn't?), history and text can cut against the Court's preferred policy just as easily as they can cut against the legislature's, and they do so here. The Constitution could hardly be more pellucid on this point: "the Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions, and under such regulations as the Congress shall make*."⁶⁵ Congress has acted, so concerns about 28 U.S.C. § 1254(2) should be addressed to Capitol

59. See Moore & Vestal, *supra* note 14, at 21 (noting that the courts of appeals "rely almost entirely upon certiorari to guarantee correct adjudication").

60. Taylor v. Atl. Mar. Co., 181 F.2d 84, 85 (2d Cir. 1950) (*per curiam*) (reasoning that the Supreme Court should have exclusive control over the cases it hears).

61. *Id.*

62. THE PRINCESS BRIDE (Metro-Goldwyn-Mayer 1987).

63. Moore & Vestal, *supra* note 14, at 23-25.

64. Hartnett, *supra* note 11, at 1711-12 & 1712 n.404 (reporting that during the period from 1946 to 2000, the Court has only accepted a certified question four times).

65. U.S. CONST. art. III, § 2 (emphasis added).

Hill, not the Supreme Court.⁶⁶ The Court was wrong when it marginalized certification in cases like *Wisniewski*,⁶⁷ and, alas, it seems the Court today is not that different from the Court of yesteryear.

Second, setting aside that certification is the product of statutory law and so should be respected by the Supreme Court regardless of whether it is a good policy or not, certification is a splendid procedural tool and ought to be a “valuable” feature of American law.⁶⁸ As Justice Stevens rightly observed, there are surely times, as in *Seale*, when certification is “appropriate.”⁶⁹ Supreme Court precedent, for instance, on occasion can be opaque. In such circumstances, why not just let appellate courts ask the Supreme Court what the law is? At the same time, any practical problems certification may have presented in days gone by—such as too many certified questions or the certification of trivial issues or poorly phrased questions⁷⁰—are extremely unlikely to recur today. Given the novelty that certification has become, does anyone doubt that certification will remain a rarely used technique that is exercised prudently?

Finally, the decision to dismiss the question in *Seale* risks causing unnecessary political trouble for the Court. The Court’s certiorari docket is shrinking, and pointed questions are being raised about whether the Court is deciding enough cases.⁷¹ By announcing that certification is still dead, the Court hazards that Congress might act in even more intrusive ways to cut back on judicial discretion. Indeed, recently, a group of prominent law professors and lawyers sent a letter to the Vice President of the United States, the United States Department of Justice, the Senate Judiciary Committee, and the House Judiciary Committee proposing, among other things, a special “Certiorari Division” composed of appellate judges to decide which cases the Court should hear.⁷² If the Court wants to ward off congressional action, an excellent

66. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 18–23 (1997). One objection to certification is that it may stunt the development of sound precedent by allowing courts of appeals to take the easy route of certifying the question rather than digging in and rendering a thoughtful decision. This strikes me as unlikely, but if it were to become a serious problem, Congress could amend 28 U.S.C. § 1254(2).

67. Hartnett, *supra* note 11, at 1711 n.401 (citing Moore & Vestal, *supra* note 14, at 43) (noting that Moore & Vestal did not “condemn or question the Court’s hostility to a valid Act of Congress”).

68. *United States v. Seale*, 130 S. Ct. 12 (2009) (statement of Stevens, J.).

69. *Id.*

70. Moore & Vestal, *supra* note 14, at 23–25.

71. See, e.g., Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES, Sept. 28, 2009, at A18 (discussing possible reasons for the Court’s diminished docket).

72. See Memorandum from Paul D. Carrington et al., *Four Proposals for a Judiciary Act* 14, 16 (Feb. 9, 2009), available at <http://www.paulcarrington.com/Four%20Proposals%20for%20a%20Judiciary%20Act.htm> (“We propose the establishment of a body of experienced appellate judges empowered and required to designate a substantial number of cases that the Court would then be required to decide on their merits.”).

talking point would be the availability of certification. That talking point would be more credible, however, if the Court actually accepted certified questions from time to time.

IV. CONCLUSION

More than sixty years ago, Moore and Vestal wrote what remains the leading article on certification jurisdiction. It was not an academic question when they wrote their article, but it has become one now. It should not be. Just as in the classroom where answering too many questions—especially poor ones—can be frustrating, it is equally frustrating to allow no questions at all.

For the federal judiciary, Congress has balanced similar interests by empowering the appellate courts to certify questions in their discretion to the Supreme Court, thereby providing a useful check on the Supreme Court's own discretion. The lower courts, after all, must implement the High Court's doctrines, so they are well-placed to know which issues merit the Court's consideration, and a policy that provides for a give-and-take relationship between the Supreme Court and the other federal courts benefits the development of the law.

Or at least it would work that way if Congress's statute was obeyed. Lamentably, certification jurisdiction is dead at the hands of the Supreme Court and, after *Seale*, it is not coming back.